Supreme Court, U.S.
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No. 96-323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

K.R., AN INFANT, BY HER PARENTS AND NEXT FRIENDS, M.R.and K.R.R., and M.R. and K.R.R.,
Petitioners,

v.

ANDERSON COMMUNITY SCHOOL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

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Petitioners' Reply Memorandum

The Respondent, Anderson Community School Corporation, in its opposing brief in 96-323, raises two points which Petitioners feel require a reply:

I. Anderson Community School Corporation attempts to distinguish the facts of this case from the case of Russman by Russman v. Bd. Of Education of the Enlarged City School Dist. Of Watervliet, 85 F.3d. 1050 (2nd Cir. 1996).

A. Anderson Community School Corporation claims to have asserted in this case that it would cost more to provide the instructional assistant to K.R. at her private school than at the public school, which claim was rejected by the District Court. (Brief in Opp, pp. 14-15) Respondent's brief references pp A-35 and A-36 of Petitioners' appendix in support of this. Petitioners would point out that the sole reference, if any, to cost was footnote 7 of the decision of the District Court as shown on pp. A-35 and A-36, which is an interrogatory and answer submitted by Anderson Community School Corporation. No evidence of cost of providing an aid either at the private school, or at the public school was ever submitted. Further no cost comparison was ever submitted in the proceedings below, and in fact, it was never raised as an issue by the Respondent in this case. This issue should not be allowed to be raised for the first time before this Court.

B. Anderson Community School Corporation also states that another distinguishable fact from the decision by the Russman Court is the claim that the placement at St. Mary's School is not appropriate, as it does not constitute the least restrictive environment. (Brief in Opp. p.15) Respondent further alleges that because St. Mary's is not barrier free this creates a safety hazard for K.R. (Brief in Opp. p. 15)

Anderson Community School Corporation has continually raised this issue at the administrative hearing level, the District Court, and the Circuit Court of Appeals, as an issue it seems to believe overrides the underlying basic issue of whether IDEA, and its accompanying regulations require K.R. be provided an instructional assistant on site at a private parochial school. The District Court Addressed this in its opinion, and found:

> "The school corporation did not even raise any concerns about safety and accessibility until the administrative hearing, long after it had decided not to provide an instructional assistant at St. Mary's." (Dist. Ct. Op. pp. 36-37)

Respondent correctly indicates that the Seventh Circuit Court of Appeals did not address this issue because it reversed the District Court solely on statutory and regulatory interpretation. (Brief in Opp. p. 16)

Anderson Community School Corporation does fail to mention that it was advised at the oral argument before the Seventh Circuit Court of Appeals, that the Court did not believe safety and accessibility were an issue in this case.

Anderson Community School Corporation states that it is in full agreement with the Seventh Circuit Court of Appeals decision (Brief in Opp. p.5) If that is true, why are they again trying to raise this issue? Petitioners must object to this issue being raised if Respondent is in full agreement with the Circuit Court decision, as it would seem they had the opportunity to file a Cross-Petition under rule 12.3 of the U.S. Supreme Court Rules. The established doctrine governing appeals to the Appellate Courts and the Supreme Court, is that a party must cross-appeal or cross-petition if the party seeks to change the judgment below or any part thereof. Federal Energy

Administration v. Algonquin Inc., 426 U.S. 548, 560 n.11 (1976); Trans World Airlines, Inc. V. Thurston, 469 U.S.111, 118 n.14 (1985). Petitioners submit that Anderson Community School Corporation cannot, on one hand agree with the decision of the Seventh Circuit Court of Appeals, and on the other, try to alter that decision without having filed a cross-petition.

II. Anderson Community School Corporation, in its' opposing brief in 96-323, objects to the issue raised by Petitioners contending that Anderson Community School's conduct violates the neutrality principle under the First Amendment, on the grounds it is just now being raised for the first time before this Court. (Brief in Opp. p.i)

Petitioners would show the Court that this issue was previously raised and is clearly in the record below.

Petitioner's complaint, filed in the District Court on May 6, 1994, contains a Preliminary Statement which states in part:

> "Defendant's action in refusing to provide necessary special education and related services violates 20 U.S.C. Sections 1401 et seq. and the regulations promulgated thereunder and infringes on Plaintiffs' free exercise of religion rights secured by the First Amendment.....(Ct. of Appeals Rec. p. 5)

The Complaint at rhetorical paragraph 14 states:

> "The defendant's refusal to extend to K.R. the important government benefit of the special education and related services which are appropriate for her unless she leaves the private school and attends public school is a burden on the free exercise of your Plaintiffs' sincerely held religious convictions and beliefs which is protected by the

free exercise clause of the First Amendment of the Constitution of the United States....."(Ct. of Appeals Rec. p.8)

Petitioners in their Brief in Support of Complaint, at pages 15 through 21, before the District Court discuss the issue of K.R.'s First Amendment rights. (Ct. of Appeals Rec. pp.59-65) In specific, on page 17 of its brief in the District Court, Petitioners state:

> "The Supreme Court clearly states that IDEA provides a benefit to the child, not the school, and that IDEA benefits are to be distributed neutrally without regard to the sectarian-nonsectarian or public-nonpublic nature of the school the child attends." (Ct of Appeals Rec. p.61)

The District Court acknowledges in its opinion:

> "Plaintiffs also argue that even if the IDEA itself does not require the school corporation to provide an instructional assistant for K.R. at St. Mary's, the school corporation's failure to do so, along with K.R.'s acknowledged need for an instructional assistant imposes a substantial burden on their choice to have K.R. attend St. Mary's. Plaintiffs claim that this burden violates their First Amendment right to free exercise of religion..." (Dist. Ct. Op. pp.A 20-A 21)

In reaching its decision, the District Court states:

> "Because plaintiffs are entitled to relief under the IDEA, this Court need not decide whether the First Amendment's Free Exercise Clause and/or the Religious Freedom Restoration Act would

independently require the same result." (Dist. Ct. Op. p. 41)

Petitioners agree with Respondent that the Circuit Court did not address this issue in its decision. Petitioners, however, submit that, based on the above, it is clear that the First Amendment rights of K.R., including the neutrality principle, have been previously raised, and are still a significant issue in this case. Petitioners believe that the objection is not well founded and should be denied.

Respectfully submitted,

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